Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal

SUPREME COURT (KUALA LUMPUR)— CIVIL APPEAL NOS 02–155–93 AND 02–156–93
ABDUL HAMID OMAR LP, EUSOFF CHIN AND MOHAMED DZAIDDIN SCJJ
8 MAY 1993

Civil Procedure *— Contempt of court — Breach of injunction — Leave to issue proceedings for contempt — Application made to set aside injunction — Whether which application should be heard first*

The respondents had obtained an ex parte interlocutory injunction restraining the appellants from doing certain acts and the respondents' case in the court below was that the appellants had breached the injunction and were accordingly in contempt of court. On that basis, the respondents, on 23 February 1993 obtained leave ex parte to issue proceedings against the appellants to commit them to prison for their contempt. On 25 February 1993, the respondents filed their substantive notice of motion ('encl 27'). Meanwhile, on 20 February 1993, the appellants filed an application ('encl 21') to set aside the injunction. At the hearing before the trial judge, counsel for the respondents took a preliminary objection that the appellants ought not to be permitted to be heard on encl 21 until after encl 27 had been disposed of. The learned judge ruled that he would take encl 27 first and having disposed of it, would then deal with encl 21. The appellants have appealed.

Held, dismissing the appeal:

(1) There are no exceptions to the general rule that a party in contempt cannot be heard until he has purged his contempt. It is a matter of discretion depending on the circumstances of the case whether or not a litigant ought to be heard notwithstanding his contempt. Although the right to be heard is a fundamental right vested in all litigants, that right however cannot be taken as an absolute right. Where the litigant shows himself to have little or no regard to an order issued against him, then he has to an extent, forfeited his right to be heard or at least postponed that right until he has suitably purged his contempt.

(2) Here, the trial judge had accepted that there was a prima facie case for contempt against the appellant. There was nothing to show that the trial judge had exercised his discretion wrongly. Nor was there any material to show that he was wrong in law or had erred in principle. The appellants have not altogether been barred from being heard on their applications to set aside the injunction. All that the High Court had done was to postpone the

hearing of those applications until encl 27 had been disposed of. This the learned judge was manifestly entitled to do and his decision to so proceed was entirely correct.

[Bahasa Malaysia summary

Penentang telah memperolehi suatu injunksi interlokutori secara ex parte untuk menghalang perayu daripada membuat perkara yang tertentu dan kes penentang di mahkamah bawah adalah bahawa perayu telah memungkiri injunksi itu dan oleh yang demikian telah menghina mahkamah. Atas alasan itu, penentang, pada 23 Februari 1993, telah mendapat kebenaran secara ex parte untuk memulakan prosiding terhadap perayu untuk memenjarakan mereka kerana menghina mahkamah. Pada 25 Februari 1993, penentang telah memfailkan notis usul substantif mereka ('lampiran 21'). Sementara itu, pada 20 February 1993, perayu telah memfailkan suatu permohonan untuk mengenepikan injunksi itu. Pada pembicaraan di hadapan hakim perbicaraan, peguambela penentang telah membuat suatu bantahan awal bahawa perayu tidak patut dibenarkan didengar atas lampiran 21 sehingga lampiran 27 diselesaikan. Hakim perbicaraan yang arif telah memberi keputusan bahawa beliau akan memutuskan soal lampiran 27 itu dahulu dan selepas ia diselesaikan, beliau akan memutuskan soal lampiran 21. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Tidak terdapat sebarang kekecualian terhadap peraturan am bahawa pihak yang menghina mahkamah tidak boleh didengar sehingga beliau membersihkan penghinaan itu. Adalah menurut budi bicara berdasarkan keadaan kes itu sama ada seorang litigan patut didengar atau tidak meskipun beliau menghina mahkamah. Walaupun hak untuk didengar merupakan suatu hak asasi yang terletak hak pada kesemua litigan, hak itu tidak boleh dianggapkan sebagai suatu hak mutlak. Apabila seseorang litigan tidak atau kurang mempedulikan perintah yang telah dikeluarkan terhadapnya, beliau pada takat itu, telah kehilangan hak beliau untuk didengar atau sekurang-kurangnya telah menundakan hak itu sehingga beliau telah membersihkan penghinaan itu.

(2) Di dalam kes ini, hakim mahkamah perbicaraan menerima bahawa terdapat suatu kes prima facie terhadap perayu untuk penghinaan mahkamah. Tidak terdapat apa-apa yang menunjukkan bahawa hakim perbicaraan telah salah menggunakan budi bicara beliau. Juga tidak terdapat apa-apa yang menunjukkan bahawa beliau salah dari segi undang-undang atau telah salah pada prinsipnya. Perayu tidak sama sekali dihalang daripada didengar atas permohonan mereka untuk mengenepikan injunksi itu. Mahkamah Tinggi hanya menunda perbicaraan permohonan itu sehingga lampiran 27 diputuskan. Hakim yang arif berhak membuat demikian dan keputusan beliau untuk membuat demikian adalah sememangnya betul.]

Notes

For cases on contempt of court, see 2 *Mallal's Digest* (4th Ed) paras 554–585.

Cases referred to

1 *Astro Exito Navegacion SA v Southland Enterprise Co Ltd and Nan Jong Iron and Steel Co Ltd* [1981] 2 Lloyd's Rep 595; [1982] Com LR 106 (refd)
2 *Hadkinson v Hadkinson* [1952] P 285; [1952] 2 All ER 567 (refd)
3 *X Ltd & Anor v Morgan-Grampian (Publishers) Ltd & Ors* [1991] 1 AC 1; [1990] 2 All ER 1 (refd)
4 *Instituo Bancario San Paolo Di Torina SPA v Colour Touch Sdn Bhd & Anor* (Civil Suit No D5–22–1410–92) (unreported) (not folld)
5 *Young v Jackman* (1986) 7 NSWLR 97 (refd)

Appeal from: Civil Suit No S4–22–75–93 (High Court, Kuala Lumpur)

Lim Kean Chye (*CC Wee* and *Ivan Wong* with him) (*Wee Choo Keong & Faaiz*) for the appellant in Civil Suit No 02–155–93.

Karpal Singh (*Karpal Singh & Co*) for the appellants in Civil Suit No 02–156–93.

G Sri Ram (*D Morias, Loh Siew Cheang* and *HH Tay* with him) (*Cheang & Ariff*) for the respondents.

Cur Adv Vult

Abdul Hamid Omar LP (delivering the judgment of the court): These two appeals arise out of a decision given by Anuar J on 23 March 1993 in respect of a procedural objection taken by the respondents. The appellants in Civil Appeal No 02–156–93 are the first and second defendants in the proceedings in the court below whilst the appellant in Civil Appeal No 02–155–93 is the third defendant in those proceedings. For the sake of convenience, we shall refer to them as the first, second and third appellants, respectively.

The background

On 9 February 1993, the respondents obtained an ex parte interlocutory injunction restraining the appellants from doing certain acts, including printing, circulating, distributing or publishing any allegation of impropriety, irregularity or illegality against the respondents or their subsidiaries and affiliated companies.

The respondents' case in the court below is that the appellants breached the injunction and are accordingly in contempt of court. On that basis, the respondents, on 23 February 1993 obtained leave ex parte to issue proceedings against the appellants to commit them to prison for their contempt.

On 25 February 1993, the respondents filed their substantive notice of motion which is encl 27 in the High Court file. Meanwhile, on 20 February 1993, the appellants filed an application to set aside the injunction. That application, which was made by a summons returnable in chambers, is encl 21 in the High Court file.

On 2 March 1993, both encls 21 and 27 came on for hearing before the learned judge. As at that date, the third appellant had filed a summons to strike out the writ (the filing having been done on 1 March 1993) and this summons was on its face returnable on 3 March 1993. This application is encl 33 in the High Court file. The learned judge's note, however, reflects that only encls 21 and 27 were before him for hearing on 2 March 1993. The appellants made some issue about this and we shall deal with it at the appropriate place in this judgment.

Due to insufficient time, the hearing scheduled for 2 March 1993 was adjourned to 3 March 1993 and again adjourned to 5 March 1993. And it seems clear that what was to be heard on 5 March 1993 were encls 21 and 27.

Preliminary objection

When the hearing on encl 21 was about to commence before the learned judge, counsel for the respondents took a preliminary objection. He argued that the appellants ought not to be permitted to be heard on encl 21 until after encl 27 had been disposed of. After hearing lengthy arguments by counsel on both sides, the learned judge reserved his ruling which he delivered on 23 March 1993. He ruled that he would take encl 27 first and having disposed of it, would then deal with encl 21. The appellants are dissatisfied with the ruling. Hence the appeals.

Procedural ruling

We would observe that this is clearly an appeal against mere procedural ruling. This court has always discouraged such appeals as they stand in the way of a speedy disposal of substantive trials and delay an expeditious result of the main proceedings. Be that as it may, on a closer examination of the matter, we are inclined to agree with Mr Lim Kean Chye of counsel for the third appellant and Mr Karpal Singh of counsel for the first and second appellants that matters of public interest and of principle are involved in these appeals.

Central in these appeals lies the important principle governing the rights, if any, of defendants who disobey orders of the court and then come forward to set aside the order disobeyed or to seek other relief from the court.

Obedience to court order

It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to

A obey an order of court runs the risk of being held in contempt with all its attendant consequences.

It has not been seriously disputed and indeed we find that it is also an established general rule of law that a party in contempt cannot be heard further in the same proceedings for his own benefit unless and until he has purged his contempt. The question which we have to determine in these
B appeals is the ambit of that general rule.

Appellants' contention

It has been urged on us by counsel for the appellants that there must first be a finding of contempt and a sentence on that finding before the rule can
C be invoked; the argument being that the party alleged to be in contempt is not in a position to 'purge' his contempt until sentence has been passed. It has also been urged on us that an exception to the general rule exists where the party alleged to be in contempt was applying to set aside the very order of which he is said to be in contempt. *Astro Exito Navegacion SA v Southland Enterprise Co Ltd and Nan Jong Iron and Steel Co Ltd*[1] and the judgment of
D Romer LJ in *Hadkinson v Hadkinson*[2] were amongst the authorities cited in support of the exception.

Finding

E We are unable to accept that any exceptions per se exist to the general rule that a party in contempt cannot be heard until he has purged his contempt. We are in favour of the views expressed by Denning LJ in *Hadkinson*[2] that it is a matter of discretion depending on the circumstances of the case whether or not a litigant ought to be heard notwithstanding his contempt. This flexible approach to the jurisdiction is based upon a discretion to be
F exercised in accordance with the circumstances of the case which was accepted by the House of Lords in *X Ltd & Anor v Morgan-Grampian (Publishers) Ltd & Ors.*[3] The recent unreported decision of Abdul Malek J in *Instituo Bancario San Paolo Di Torina SPA v Colour Touch Sdn Bhd & Anor*[4] was cited in support of the proposition that the rule would only apply where a writ of attachment or order of committal had been made. In our
G judgment, such a qualification on the application of the rule would be to place an unnecessarily low burden of obedience on the offending party. The rationale for the rule is public policy. Orders of court must be treated with respect and require strict obedience.

In this regard, we are mindful of the competing public interest in a
H litigant having a right to be heard. Although the right to be heard is a fundamental right vested in all litigants, that right however cannot be taken as an absolute right. Where the litigant shows himself to have little or no regard to an order issued against him, then he has to an extent, forfeited his right to be heard or at least postponed that right until he has suitably purged his contempt.

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Prima facie case for contempt

In the appeals before us, leave to issue committal proceedings has been granted. This means that the learned High Court judge has accepted that

there was a prima facie case for contempt against the appellants. It may well be that on the hearing of the motion proper, the appellants will be acquitted of any charge of contempt. However, for purposes of the present appeals, the allegations of contempt are supported by the order for leave. In *Instituo Bancario San Paolo Di Torina SPA*[4], there appears to have only been an allegation of contempt without any more. Here, there is a finding of prima facie contempt which cannot be ignored. In this context, we are more inclined to accept the view expressed by Young J in *Young v Jackman*[5] where he said: 'Accordingly, it would seem from 1820 onwards that the rule that a person will not be heard when he is guilty of contempt extended as well to the case where a party was considered to be in contempt, that is, where his contempt *had prima facie been demonstrated* to the court or alternatively when he had confessed the facts which were the subject of a charge of contempt.' (Emphasis added.)

We have carefully read the appeal records and especially references made therein to the conduct of the appellants in general and the conduct of the third appellant in particular. This conduct relates to the manner in which the allegations of contempt arose. From the records, we are satisfied that the learned judge had ample material before him to exercise his discretion in the manner in which he did.

Enclosure 33

This takes us back to the argument advanced during the appeals that no mention was made of encl 33 (the striking out application). Having perused the learned judge's note, it is clear that encl 33 was not in fact called on for hearing before him nor was any argument advanced on encl 33. There is some brief reference to a striking-out application made by Mr Karpal Singh in the note. However, in the first and second appellants' record of appeal, that application was exhibited as an unsealed copy which obviously could not have been before the court. On each of the dates of hearing the learned judge has recorded that only encls 21 and 27 were before him. Assuming encl 33 had been before the learned judge for hearing and therefore erred in law in not making any order in respect of it, why was it that the notices of appeal filed by the appellants made no mention of encl 33? We can only assume that the reference to encl 33 during these appeals was an afterthought.

Exercise of discretion

It is an established principle that an appellate court will not interfere with the exercise of a discretionary jurisdiction of the court below unless that discretionary jurisdiction was not exercised judicially or was wrong in law. In these appeals, there is nothing to show that the learned judge had exercised his discretion wrongly. Nor is there any material before us to show that he was wrong in law or had erred in principle. The appellants have not altogether been barred from being heard on their applications to set aside the injunction. All that the High Court has done is to postpone the hearing of those applications until encl 27 has been disposed of. This the learned judge was manifestly entitled to do and his decision to so proceed is in our view entirely correct.

Before we conclude, it is necessary to refer to an argument addressed to us by Mr Karpal Singh in his final reply where he submitted that the learned judge had, in the course of his short written ruling refusing a stay of proceeding, shown that he had prejudged the issues before him. The learned judge in that ruling merely referred to the prima facie finding of contempt that he had made and which the law requires him to make on an ex parte application for leave to commit. We are satisfied that there is no merit whatsoever in the attack made upon the learned judge's comments and findings. Indeed, we are of the view that the learned judge has left the question of guilt or innocence on the substantive motion completely open.

For these reasons, we dismiss these appeals with costs. The deposits paid into court by the appellants shall be paid out to the respondents to account of their taxed costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim